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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86- 6384

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LARRY ROMINE,

Petitioner,

vs.

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STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86- 6304

LARRY ROMINE,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S REPLY BRIEF

In its Brief in Opposition to Petitioner's Petition for Writ of Certiorari, the Respondent suggests that this Court cannot review Petitioner's federal constitutional questions because the decision below is based upon independent and adequate state grounds. The Respondent does not contend that the questions presented in this Petition are not substantial federal questions. Neither does the Respondent contend that these federal questions were not properly raised and presented in the trial court and in the Supreme Court of Georgia. Rather, the Respondent contends that the Supreme Court of Georgia's failure to address Petitioner's properly raised federal constitutional questions is sufficient to defeat this Court's jurisdiction.

Contrary to Respondent's position, as is set out more fully herein, the Supreme Court of Georgia addressed the federal constitutional questions presented in this Petition and decided them adversely to Petitioner. Moreover, inasmuch as these federal questions are controlling, the state law grounds of the decision below can be neither independent nor adequate to support the decision. Therefore, this Court should grant the Petition for the reasons set forth therein.

In the Supreme Court of Georgia, Petitioner contended that no matter how it is modified, an Allen charge, when given in the sentencing phase of a capital murder trial where the inability of the jury to reach a unanimous verdict results in a life sentence, is impermissibly coercive and fundamentally unfair in violation of the Eighth and Fourteenth Amendments.[1] The Supreme Court of Georgia stated this issue by quoting verbatim from Petitioner's second enumeration of error: "Romine next contends that 'the Allen charge...is impermissibly coercive when given in the sentencing phase of a death penalty trial.'" Romine v. State, 256 Ga. 521, 526 (1986) (emphasis added).

Having stated the federal constitutional question, the court proceeded to address it and decide it adversely to Petitioner. The court held that "the Allen charge given here was fair and accurate". Romine v. State, 256 Ga. at 527 (emphasis added). By holding that the Allen charge was fair, the court necessarily rejected Petitioner's federal conetitutional argument that the charge was impermissibly coercive and unfair.

The Respondent's argument that the court did not address Petitioner's federal question concerning the trial court's charge

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1. This issue cannot be decided by simply calling the trial court's charge "supplemental instructions" instead of an Allen charge. Petitioner is attacking not the name given to the charge but the language contained in the charge. The charge is unconstitutional regardless of what state law may call it.

that the jury could not consider the evidence of Petitioner's prior difficulties with his parents in deciding what sentence to impose is not easy to follow because nowhere does the Respondent suggest what the non-federal grounds of the decision might be. Petitioner's argument in the Supreme Court of Georgia in this regard was that the trial court impermissibly prohibited the jury from considering relevant mitigating evidence contrary to Lockett v. Ohio, Eddings v. Oklahoma, and the Eighth and Fourteenth Amendments. No other argument was made. By holding that the charge as a whole did not limit the jury's consideration of relevant mitigating evidence, the Supreme Court of Georgia addressed and rejected Petitioner's federal claim.

This Court clearly has jurisdiction to review federal questions that the Supreme Court of Georgia addressed and decided adversely to Petitioner. Inasmuch as the Supreme Court of Georgia specifically addressed Petitioner's federal questions, the Respondent's argument amounts to little more than speculation that it might have been possible for the court to have decided the issues based upon state law. This is not sufficient to defeat this Court's jurisdiction. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977).

Even had the Supreme Court of Georgia not expressly addressed Petitioner's properly raised federal questions, a state court cannot defeat this Court's jurisdiction by refusing to address properly raised and controlling federal questions. More than fifty years ago, this Court recognized that federal rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." Lawrence v. State Tax Commissioner, 286 U.S. 276, 282 (1932). Petitioner's federal questions were properly raised. If decided adversely to state

law, they were controlling.[2] Under these circumstances, the Supreme Court of Georgia cannot "defeat federal review merely by issuing a tight-lipped decision in favor of the challenged state law." (Language quoted from Super Tire Engineering Co. v. McCorkle, 550 F.2d 903, 907 (1977). See Minnesota v. National Tea Co., 309 U.S. 551, 556 (1940). It is important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.).

CONCLUSION

The petition for the writ of certiorari to the Supreme Court of the State of Georgia should be granted.

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2. The controlling question as to the Allen charge is whether or not it violates the Eighth and Fourteenth Amendments when given in the sentencing phase of a death penalty trial. If the charge is unconstitutional, nothing decided as a matter of state law can make it constitutional. These state law grounds can be neither independent nor adequate because federal law is controlling and the state law grounds are so interwoven with the federal grounds as not to be independent. Michigan v. Long, 463 U.S. 1032 (1983); Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157, 164 (1917). The same is true with respect to the prior difficulties charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I served copies of the annexed Reply Brief of Petitioner on Respondent by depositing copies in the United States Mail, first class mail, postage prepaid, addressed as follows:

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All parties required to be served have been served. Done this 14th day of April, 1987.

Thomas P Lenzer

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